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Facts: This interlocutory appeal arises from a wrongful termination action brought by Robin Grove, appellee, against Governor Robert L. Ehrlich, Jr., appellant. Since the suit's September 10, 2003, inception, the parties have been mired in a discovery dispute. The subject of this dispute, as it relates to this interlocutory appeal, is whether Grove is to be granted access to information that the Governor claims is protected by executive privilege, attorney-client privilege or the work product doctrine.

At the time he filed suit, Grove served the Governor with document requests. In addition to information relating to Grove's employment and termination, those requests sought access to personnel records of State employees who are not parties to Grove's suit and documents created and used by Governor Ehrlich's gubernatorial transition team. The record reflects that the total number of documents that may have been involved, was as high as 80,000 documents. The Governor declined to produce some of the documents sought on the grounds of executive privilege, attorney-client privilege, and/or the work product doctrine. This discovery dispute has lasted the better part of three years and involved more than one interlocutory appeal to the Court of Special Appeals.

On May 2, 2006, the Circuit Court convened a conference with counsel for each party to determine the manner in which the trial court would comply with the Court of Special Appeals's order directing it to conduct an *in camera* review of the documents in question and determine whether Grove should be made privy to them through expanded *in camera* review. At the hearing, the Governor asserted that 341 individuals fell within the category of

individuals about which Grove was seeking information and offered to provide the trial court with 30 of those files for *in camera* review to demonstrate, by way of example, why the information contained therein was confidential or privileged. On May 8, 2006, the Circuit Court issued an opinion and order stating that the only information in the personnel files that was relevant to Grove's claim were the communications regarding the particular employee's termination. The court also ordered the two parties to draft a letter to the 341 individuals asking them to release the remaining documents in their personnel files to Grove. The trial court had already determined this information was irrelevant to his claim.

On May 24, 2006, the Circuit Court for Baltimore City issued a second order and opinion. In it, the court discussed the parties' failure to agree on a letter to be sent to the 341 individuals in question. The court then directed the parties to mail a letter drafted by the court to those individuals. The Circuit Court also ordered the Governor to make certain State Agency documents and gubernatorial transition team documents available to Grove. On August 29, 2006, prior to the court of Special Appeals hearing arguments, this Court, on its own motion, issued a writ of certiorari.

Held: Vacated. The Court of Appeals held that an interlocutory appeal is appropriate under the extraordinary circumstance of a discovery order being directed to a high government official when the collateral order doctrine's four-part test is met and that the Circuit Court for Baltimore City abused its discretion when it ordered expanded *in camera* review of documents protected by the attorney-client privilege or the work product doctrine. Moreover, the trial court abused its discretion when it solicited the consent of third parties to release documents it held were irrelevant and not reasonably calculated to lead to admissible evidence in Grove's case.

Robert L. Ehrlich, Jr., et al. v. Robin D. Grove, No. 54, September Term, 2006, filed January 11, 2007. Opinion by Cathell, J.

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ATTORNEYS – MISCONDUCT - USE OF TRUST ACCOUNT AS PERSONAL ACCOUNT – FAILURE TO COOPERATE WITH BAR COUNSEL – INTENTIONAL MISAPPROPRIATION OF FUNDS

Facts: Alphonzo Jerome Butler was admitted to the Maryland Bar in 1996 and had a solo practice in Silver Spring, Maryland. Butler opened his Attorney Trust Account on May 9, 2002. The Attorney Grievance Commission of Maryland, through Bar Counsel, acting pursuant to Maryland Rule 16-751, filed a Petition For Disciplinary Or Remedial Action against Alphonzo Jerome Butler on July 22, 2005, charging various violations in connection with Butler's maintenance and use of his Attorney Trust Account.

On April 20, 2006, the Circuit Court for Montgomery County held a hearing and on April 27, 2006, issued Findings of Fact and Conclusions of Law, in which it found that Alphonzo Jerome Butler had violated Maryland Rules of Professional Conduct (MRPC) 1.15(a), 8.1(b), 8.4 (a), (b), (c), (d), Maryland Rule 16-607, Maryland Rule 16-609, and §§ 10-306 and 10-606 of the Business Occupations and Professions Article of the Maryland Code.

The Court of Appeals agreed with the hearing court's finding that Butler's usage of his escrow account as a personal bank account constituted a violation of MRPC 1.15(a). Butler used his Attorney Trust Account for personal and business matters, making payments to Pepco, Verizon, Global pay Global STL, and American Express Collection in violation of MRPC 1.15(a)

The hearing court found that one of Mr. Butler's clients entrusted Butler with the funds for the client's child support payment, directing Butler to make the payment on his behalf. In turn, Butler deposited the funds into his Attorney Trust Account but failed to maintain the funds until the check cleared. His bank honored the check, leaving a negative balance in Butler's Attorney Trust Account. Accordingly, Butler violated § 10-306 of the Business Occupations and Professions Article of the Maryland Code when he used client funds for a purpose other than that for which the money was entrusted to him. In violating § 10-306, Butler also violated §10-606(b) which provides, "[a] person who willfully violates any provision of Subtitle 3, Part I of this title [. . .], is guilty of a misdemeanor . . . ."

MRPC 8.4(a) provides that "[i]t is professional misconduct for a lawyer to [. . .] violate or attempt to violate the Maryland Lawyers' Rules of Professional Conduct . . . ." Because Butler violated MRPC 1.15(a), his conduct also violated MRPC 8.4(a). MRPC 8.4(b) prohibits a lawyer from "commit[ting] a criminal act that reflects adversely on the lawyer's honesty,

trustworthiness, or fitness . . . ." When Butler deposited client funds in his trust account and intentionally failed to maintain those funds in his account, he committed a criminal act in violation of MRPC 8.4(b).

MRPC 8.4(d) is violated when an attorney's conduct "negatively impacts [. . .] the public's image or the perception of the courts or the legal profession . . . ." *Attorney Griev. Comm'n v. Cherry-Mahoi,* 388 Md. 124, 160, 879 A.2d 58, 80 (2005). Because Butler's conduct constituted an intentional misappropriation of client funds, his conduct also violated MRPC 8.4 (d).

In addition, Bar Counsel sent numerous requests to Butler requesting that he supply information necessary to its investigation. Bar Counsel sent requests to Butler dated July 15, 2004 and October 14, 2004, to which he never responded. Butler had an affirmative duty to respond to Bar Counsel's requests for information, yet failed to do so, in clear violation of MRPC 8.1(b).

Held: Butler failed to offer any mitigating factors or any sufficiently compelling excuse for his egregious conduct. In light of the totality of the circumstances and the severity of Butler's misconduct, disbarment was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Alphonzo Jerome Butler, AG No. 27, September Term, 2005, filed October 16, 2006, Opinion by Greene, J.

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ATTORNEYS - MISCONDUCT – FAILURE TO KEEP COMPLETE RECORD OF CLIENT FUNDS – INTENTIONAL MISAPPROPRIATION OF FUNDS

Facts: Quinton D. Roberts was admitted to the practice of law in Maryland on December 16, 1999. Roberts worked as an

associate for a Baltimore law firm from September 1999 until March 2001. From March 2001 through July 2005, he worked in Baltimore as a solo practitioner under the trade name Roberts Law Group, LLC. Roberts has worked for the Office of the Public Defender for Prince George's County since August 2005.

The Attorney Grievance Commission, through Bar Counsel, filed a petition for disciplinary or remedial action against Roberts, charging him with violations related to his failure to maintain and timely disburse settlement proceeds rightfully belonging to his client and his client's medical providers as a result of payment for a personal injury claim.

Petitioner alleged violations of Maryland Lawyer's Rules of Professional Conduct ("MRPC") Rules 1.1 (Competence), 2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.15 (Safekeeping Property), and 8.4 (Misconduct). Bar Counsel also alleged that Roberts violated Maryland Rule 16-609 (Prohibited Transactions) and Md. Code (1989, 2004 Repl. Vol. & 2005 Supp.), § 10-306 of the Business Occupations and Professions Article.

The Court of Appeals referred the petition to the Circuit Court for Baltimore City to conduct a hearing and make findings of Fact and Conclusions of Law. After reviewing all arguments and evidence presented in this case by both parties, the hearing court concluded on January 9, 2006, that Roberts violated Rules 1.3, 1.15(a) and (b), and 8.4(c) and (d) of the MRPC; Maryland Rule 16-609; and Md. Code (1989, 2004 Repl. Vol. & 2005 Supp.), § 10-306 of the Business Occupations and Professions Article.

The hearing court found that while in solo practice from March 2001 through July 2005, Roberts did not maintain any other written records or ledger cards that detailed the client funds that were being held in trust. Roberts instead relied only on bank statements as his record-keeping system for client trust funds. When he opened his Trust Account, Roberts did not request check-writing authority. Therefore, it was Roberts's normal business practice to transfer funds from his Trust Account into his Operating Account, where he did have check-writing authority. Roberts was also not aware that transferring escrow funds into his Operating Account might violate the MRPC. The hearing court concluded that Roberts clearly and "intentionally commingled client escrow funds with his own funds in his Operating Account on a regular basis." Further, after transferring his client's personal injury settlement funds into his Operating Account, Roberts utilized this account for business and personal purposes.

During the hearing Roberts did not produce any records that demonstrated that he safeguarded or maintained the $5,000 personal injury settlement in his Operating Account due and payable to his client and his client's medical providers for the entire time between June 22, 2004, and October 16, 2004. In connection with his delay in distributing settlement proceeds, Roberts did not have sufficient funds in his Trust and Operating Accounts to cover the total owed to the two medical providers for the majority of the time between the date that the settlement funds were available to Roberts and the date that his client was presented with his first distribution check.

Roberts alleged that he delayed payments to the medical providers in order to negotiate a better deal for his client. The hearing court did not find this explanation for delaying payments to the medical providers to be credible upon considering that "Roberts never discussed negotiating such reduced medical payments with Mr. Huggins until one month after [his client]'s personal injury case had been settled and the . . . settlement payment had been received."

Roberts contended "that he was delayed for personal reasons in that he traveled out of state to be married, that it took time for him to negotiate a better deal with the medical providers, and that he had to cancel [the] September 2004 meeting [with his client] (where he had planned to give his client a check for $1,000) as a result of a fire in [Roberts's] office building." The hearing court did not find Roberts's stated reasons for delaying payment to his client to be credible after considering all the facts.

Held:. The Court of Appeals held that the mitigating factors introduced by Roberts to justify his intentional misappropriation of funds were not sufficiently compelling to excuse his actions. Therefore, the Court found that Roberts's misconduct warranted disbarment.

Attorney Grievance Commission of Maryland v. Quinton D. Roberts, No. 35, September Term, 2005, filed August 3, 2006, Opinion by Greene, J.

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CIVIL PROCEDURE - VOLUNTARY DISMISSAL WITHOUT PREJUDICE - SUMMARY JUDGMENT - ABUSE OF DISCRETION - PROTECTION OF MINOR'S RIGHTS IN LITIGATION

Facts: Respondents, the Skevofilaxes, individually and as next friends of their eight-year-old minor son, filed suit in the Circuit Court for Baltimore City seeking damages from several corporations engaged in the manufacture of pediatric vaccines. Respondents claimed that their minor son's autism was caused by toxic levels of mercury contained in thimerosal, a preservative used in the vaccines. After three-amended scheduling orders and nearly eleven months of discovery, Respondents' sole expert on specific causation withdrew from further participation in the case without ever having rendered his anticipated expert opinion. The Circuit Court denied Respondents' motion for voluntary dismissal without prejudice, and entered summary judgment in favor of Petitioners due to Respondents' "conceded inability to produce an expert witness on the area of specific causation in connection with this proceeding." The Court of Special Appeals, in an unreported opinion reversed, holding that the Circuit Court improperly applied the pertinent legal factors in its analysis. The intermediate appellate court held further that, because Maryland courts traditionally have been solicitous of the legal rights of minors, the plaintiff's minority status weighed heavily in favor of voluntary dismissal without prejudice. The Court of Appeals granted the vaccine makers' petition for certiorari.

Held: Reversed. The decision to grant or deny a motion for voluntary dismissal, pursuant to Maryland Rule 2-506(b), is addressed to the sound discretion of the trial court, and will not be overturned on appeal absent a showing that the trial judge abused that discretion. *Owens-Corning Fiberglas Corp. v. Fibreboard Corp.*, 95 Md. App. 345, 349-50, 620 A.2d 979, 982 (1993). So long as the Circuit Court applied the proper legal standards and reached a reasoned conclusion based on the facts before it, an appellate court should not reverse merely because the appellate court would have reached a different conclusion. *Northwestern Nat'l Ins. Co. v. Samuel R. Rosoff, Ltd.*, 195 Md. 421, 436, 73 A.2d 461, 467 (1950). The trial court recounted properly the following four non-exclusive factors which instruct a decision whether to grant a voluntary dismissal: (1) the non-moving party's effort and expense in preparing for trial; (2) excessive delay or lack of diligence on the part of the moving party; (3) sufficiency of the reason of the need for dismissal; and (4) whether a motion for summary judgment or other dispositive motion is pending. *Witzman v. Gross*, 148

F.3d 988, 991-92 (8th Cir. 1998). Based on the record before the trial court at the time of its decision, a reasonable trial judge could adopt the view that a motion for voluntary dismissal was inappropriate.

This Court has in the past held that a trial court has a special duty to protect the rights and interests of a minor plaintiff who is represented by a next friend to ensure that the next friend does not prejudice those rights and interests through conflict of interest, fraud, or neglect. *Fulton v. K & M Associates*, 331 Md. 712, 629 A.2d 716 (1993); *Berrain v. Katzen*, 331 Md. 693, 629 A.2d 707 (1993). Absent conflict of interest, fraud, or neglect by a parent, guardian, next friend, or the minor's attorney, however, a motion for voluntary dismissal filed on behalf of a minor should not be analyzed any differently than a motion for dismissal without prejudice filed by any plaintiff.

Despite three amended scheduling orders and approximately eleven months allotted to conduct discovery, Respondents were unable to produce an expert who could testify to specific causation within a reasonable degree of scientific certainty. Respondents' claims must fail as a matter of law. Summary judgment, therefore, in favor of Petitioners-Defendants was proper.

Aventis Pasteur, Inc. v. Skevofilax, No. 15, September Term, 2006, filed January 8, 2007. Opinion by Harrell, J.

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CRIMINAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL - SENTENCING OF A CAPITAL DEFENDANT

Facts: In this capital case, Appellee, Lawrence Michael Borchardt, was tried before a jury in the Circuit Court for Anne Arundel County and convicted of two counts of first degree murder, two counts of felony murder, and robbery with a deadly

weapon. The State filed a notice of intention to seek the death penalty. At the sentencing phase, as aggravating factors, the jury found unanimously that Borchardt was a principal in the first degree as to the murder of both Mr. and Mrs. Ohler, that Borchardt committed more than one offense of murder in the first degree arising out of the same incident, and that Borchardt committed the murders while committing a robbery. As to mitigating circumstances, one or more jurors found the following to exist: "dysfunctional family (emotional, physical, [and] sexual abuse)," "life without parole is severe enough," and "health problems." The jury found that the aggravating circumstances outweighed the mitigating circumstances by a preponderance of the evidence, and Borchardt was sentenced to death. On direct appeal, this Court affirmed the judgment of convictions and the sentence. *Borchardt v. State*, 367 Md. 91, 786 A.2d 631 (2001), *cert. denied*, 535 U.S. 1104, 122 S.Ct. 2309, 152 L.Ed.2d 1064 (2002).

Borchardt filed a petition for postconviction relief, alleging ineffective assistance of counsel during the guilt/innocence and sentencing phases of his trial. The Circuit Court ordered a new sentencing proceeding based on ineffective assistance of counsel. The postconviction court ruled that trial counsel were ineffective at sentencing for failing to call as a witness at sentencing the mitigation specialist, Pamela Taylor, and for not putting her social history report before the jury. The postconviction court held further that trial counsel were ineffective for either failing to call Dr. Lawrence Donner, a clinical psychologist who was hired to perform a pre-trial neuropsychological evaluation of Borchardt, or obtaining a videotape of Dr. Donner's testimony or calling another neuropsychologist in his place. Trial counsel were deemed ineffective also for agreeing to limit the testimony of Dr. Thomas Hyde to preclude him from testifying that a nexus existed between Borchardt's organic brain impairment and behavior at the time of the murders, for not presenting evidence concerning Borchardt's potential for future dangerousness, and for the cumulative effect of the errors alleged by appellee to have occurred at sentencing.

Borchardt alleged also that based on a study by Dr. Raymond Paternoster, (the Paternoster Study), the Maryland death penalty permits the arbitrary and capricious selection of capital defendants in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. The postconviction court held the issue *sub curia* pending any appeal by the State and its resolution. The State filed a timely application for leave to appeal, which the Court of Appeals granted.

Held: Reversed. The Court of Appeals held that the postconviction court unreasonably applied *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) to the allegations in appellee's petition for postconviction relief. The Court noted that, under *Wiggins*, the standard for determining whether counsel's performance was deficient in conducting a mitigation investigation is "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background was itself reasonable." In accordance with this standard, the Court held that trial counsel was not constitutionally ineffective.

The postconviction court did not rule on the Paternoster Study issue raised in Borchardt's petition for postconviction relief. The postconviction court held the Paternoster Study issue "in abeyance and [a hearing] conducted only if the State seeks leave to appeal, leave is granted and the upper court reverses this Court's May 26, 2005 decision granting Defendant a new sentencing." The Court of Appeals held this ruling was error. Md. Rule 4-407 and the precedents of the Court require that the postconviction court rule globally and concurrently on each allegation raised in the postconviction petition. The purpose of the requirement of a ruling on each ground raised in the petition is to provide a comprehensive state-court review of the petitioner's claims and to eliminate delay and multiple postconviction hearings and federal hearings. As to the Paternoster Study itself, the Court found that, based on *Evans v. State*, __ Md. __, __ A.2d __, WL 3716363 (2006), the Paternoster Study claim that the Maryland death penalty permits the arbitrary and capricious selection of capital defendants was without merit.

The Court held that the postconviction court erred in finding sentencing counsel ineffective by not calling Taylor as a witness. The Court concluded that counsel conducted a thorough investigation and that based upon that information, made a strategic decision based upon the benefits and the risks in deciding not to call the witness. Before deciding not to call her as a witness, trial counsel had discussions with the mitigation specialist about her findings. The Court reasoned that trial counsel had made a strategic judgment entitled to deference in deciding not to call the mitigation specialist; trial counsel were concerned that the mitigation specialist would be subject to cross-examination on the issue of future dangerousness and other information harmful to Borchardt. Moreover, the Court noted that the mitigation specialist's

prospective testimony would have been largely cumulative of what the jury heard from appellee's brother and other mitigation witnesses at sentencing. Unlike in *Wiggins*, additional investigation by trial counsel would not have uncovered new mitigation evidence that would have led a reasonably competent attorney to investigate further.

The Court held that the postconviction court erred in finding sentencing counsel ineffective in failing to call Dr. Donner as an expert witness or failing to either video-tape his testimony or call another expert in neuropsychology. Trial counsel were concerned about opening the door to unfavorable information on cross-examination, and also wished to avoid having Borchardt examined by the State's expert, Dr. Lawrence Raifman. The Court reasoned that the decision whether to call a witness is ordinarily one of trial strategy entitled to deference. Trial counsel had a legitimate reason for not calling Dr. Donner as a witness that furthered a particular goal at trial and was calculated to serve their client's interest.

The Court held that the postconviction court erred in finding that sentencing counsel was ineffective in failing to present evidence relating to future dangerousness. Defense counsel had explained that he had made a tactical judgment to prevent the State from focusing on Borchardt's criminal background, bad acts and repeated threats, in order not to detract from the mitigation case. The Court held that "because the record is replete with bad acts committed by Borchardt and other damaging information, and defense counsel made a strategic judgment to avoid examination of Borchardt by the State's expert, defense counsel's strategy was not unreasonable."

The Court held that the postconviction court erred in finding that sentencing counsel was ineffective in agreeing to limit Dr. Hyde's testimony. Even though Dr. Hyde was not permitted to testify that a nexus existed between appellee's organic brain impairment and his behavior on the day of the murders, the Court noted that Dr. Hyde's testimony put "substantial mitigating evidence" before the sentencing jury, and that multiple jurors found the non-statutory mitigating circumstance of "health problems." In addition, the Court rejected Borchardt's other arguments that trial counsel were required to consult with Dr. Hyde before agreeing to limit his testimony on Borchardt's potential for future dangerousness, the contents of various damaging State's exhibits, and the ramifications of Borchardt being diagnosed with anti-social

personality disorder by the State's expert. Neither *Strickland* nor *Wiggins* requires trial counsel to consult with their experts on every strategic or tactical issue that arises during the preparation of a mitigation case.

State of Maryland v. Lawrence Michael Borchardt, No. 58, September Term, 2005, filed January 12, 2007. Opinion by Raker, J.

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EMPLOYMENT - DISCRIMINATORY DISCHARGE - STATUTE OF LIMITATIONS - ACCRUAL OF CAUSE OF ACTION - ACTUAL DATE OF DISCHARGE

Facts: Suzanne Haas was hired by Lockheed Martin Corporation in 1998 as a human resources professional in the Mission Systems division. She worked in that capacity for approximately one and one-half years at the level of performance typical for new employees and received mainly positive evaluations from her supervisors. In June 1999, however, a supervisor and Haas herself noted her difficulty in observing close attention to detail. Haas sought a psychiatric evaluation in January 2000, which yielded a diagnosis of Attention Deficit Disorder (ADD) and learning disabilities. Haas made her supervisors aware of this diagnosis and assured them that medication was alleviating the symptoms of her disorders. In May 2000, as part of a restructuring at Lockheed, Haas began splitting her work time between Mission Systems and a new human resources department under a new supervisor, Dr. Candice Phelan. Despite what seemed initially to be a mutually amicable working relationship and Haas's assurances that her ADD would not adversely effect her work, an apparent conflict arose. Haas alleged that Dr. Phelan persistently disparaged her work and performance at Lockheed and made allusions to the desirability of Haas working for another employer. Haas also received a below standard rating from Dr. Phelan in a performance evaluation, which led to the implementation of a disciplinary procedure called a Performance Improvement Plan. In

April 2001, Phelan informed Haas that certain of her responsibilities were being transferred to a new position elsewhere in the company for which Haas would have to apply. Haas was not selected for the new position but, instead, was notified on 9 October 2001 that she was to be laid off, effective 23 October 2001. Haas's last day of work was 23 October 2001.

On 22 October 2003, Haas filed suit in the Circuit Court for Montgomery County alleging that her discharge was motivated by discrimination based on a false perception by Lockheed and Dr. Phelan that she had a disability and was unable to properly perform her job duties. Lockheed moved for summary judgment on the ground that Haas's claim was barred by the two year statute of limitations for discriminatory discharge actions. Lockheed argued that Haas's claim accrued on the date of the layoff notification, 9 October 2001, thus making the Complaint untimely as it was filed after 9 October 2003. The Circuit Court granted summary judgment to Lockheed based upon the accrual rule derived from the U.S. Supreme Court's decisions in *Ricks v. Delaware State College*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) and *Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981) (per curiam), which define a "discharge" as the notification of an employee's termination. Haas appealed to the Court of Special Appeals, which affirmed the judgment of the Circuit Court. *Haas v. Lockheed Martin Corp.*, 166 Md. App. 163, 887 A.2d 673 (2005). The Court of Appeals granted a *writ of certiorari*, on Haas's petition. 393 Md. 160, 900 A.2d 206 (2006).

Held: Reversed and remanded to the Court of Special Appeals with directions to reverse judgment of the Circuit Court and remand the case to the Circuit Court for further proceedings. Section 42(b) of Article 49B of the Maryland Code imposes a two year limitation on discrimination actions filed pursuant to a Montgomery County law which was invoked here by Haas to challenge substantively her discharge. The Court of Appeals concluded, after a *de novo* review of the grant of summary judgment, that the undefined term "discharge" found in the subject Montgomery County Code provision prohibiting discriminatory discharges is plainly understood to mean the actual cessation of employment, rather than the mere notification of an impending discharge. This conclusion rejects the U.S. Supreme Court's accrual rule derived from the academic tenure denial cases of *Ricks v. Delaware State College* and *Chardon v. Fernandez*. That accrual rule, often referred to as the "*Ricks/Chardon* rule," for statute of limitation purposes, defines a "discharge" as the notification of an employee's termination. Instead, the Court of Appeals embraced a bright line rule supported by the plain meaning of the word "discharge", as well as various policy considerations persuasively discussed by

a minority of states (particularly Hawaii, California, and New Jersey) rejecting the *Ricks/Chardon* rule. *Ross v. Stouffer Hotel Co.*, 879 P.2d 1037 (Haw. 1994); *Romano v. Rockwell Int'l Incorp.*, 926 P.2d 1114 (Cal. 1996); *Alderiso v. Medical Ctr. of Ocean County, Incorp.*, 770 A.2d 275 (N.J. 2001) and *Holmin v. TRW Incorp.*, 748 A.2d 1141 (N.J. Super. Ct. 2000).

The Court rejected the invitation to construe the term "discharge" as the *Ricks* Court had done in the Title VII context, despite the largely analogous relationship between Title VII and Article 49B. Instead, the Court of Appeals concluded that "discharge" plainly meant the complete cessation of employment. The Court then explained the policy considerations favoring the bright line accrual rule. First, the bright line rule provides clear and simple guidance for employers, employees, and courts in determinating when a discriminatory discharge action accrues. The minority approach furthers the anti-discrimination remedial purpose of Article 49B by sustaining meritorious claims that otherwise may have been barred by adherence to the *Ricks/Chardon* rule. The Court also rejected the *Ricks/Chardon* rule because of its potential to propagate unripe suits and tendency to frustrate the conciliation process for termination notifications not yet effectuated. Finally, the underlying rationale for statute of limitation defenses was not, and is not likely to be, present in wrongful termination suits because of the low risk of witnesses' failing memories and lost evidence.

Suzanne Haas v. Lockheed Martin Corporation, No. 5, September Term 2006, filed January 9, 2007. Opinion by Harrell, J.

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FAMILY LAW - GRANDPARENTAL VISITATION STATUTE - STATUTE INTERPRETED TO CONTAIN REBUTTABLE PRESUMPTION FAVORING PARENTAL DECISION AS IN CHILD'S BEST INTERESTS

FAMILY LAW - GRANDPARENTAL VISITATION STATUTE - STATUTE INTERPRETED TO REQUIRE THRESHOLD FINDING OF PARENTAL UNFITNESS

OR EXCEPTIONAL CIRCUMSTANCES TO TRIGGER BEST INTERESTS INQUIRY

Facts: Glen and Andrea Koshko are the custodial parents of three minor children, Kaelyn, Haley, and Aiden. The couple met and began dating after then-Andrea Haining moved back into her parents', John and Maureen Hainings', home in Middletown, New Jersey. Andrea purportedly had left the Hainings' residence initially to escape the acrimonious environment there, but returned from Florida after a former boyfriend abandoned her when she became pregnant. On 26 September 1994, Andrea gave birth to Kaelyn, who was raised in her grandparents' home for the first three years of her life. During this time, the Hainings were very involved in Kaelyn's upbringing. In September 1997, Andrea and Kaelyn moved out of the Hainings' residence to live with Glen in nearby Point Pleasant, New Jersey. Despite the move, Maureen Haining maintained a close relationship with Kaelyn and visited her often. Eventually, Glen and Andrea became affianced and, contrary to the plans and wishes of the Hainings, eloped in 1998. In June 1999, the newlywed couple and Kaelyn moved to Baltimore County in connection with Glen's employment. At the time of the move, Kaelyn was nearly five years old. The family has remained in Baltimore County. The couple's two other children, Haley and Aiden, were born in Maryland on 21 August 1999 and 19 December 2002, respectively.

From the time the Koshkos moved to Maryland until October 2003, the Koshkos and Hainings maintained a regular visitation regimen. The families essentially took turns traveling to one another's homes once every month. In between visits the grandparents and grandchildren maintained a relationship via correspondence. This visitation regimen abruptly ceased in October 2003 when the adults of the two families became embroiled in a bitter argument over Glen's approach to his terminally-ill mother's deteriorating condition. The Hainings perceived Glen to be nonchalant in this regard. Apparently disturbed by the Hainings' criticism, Glen Koshko asserted that he would no longer permit the Hainings to visit their grandchildren. Despite the Hainings' repeated attempts over several months to reconcile their dispute with the Koshkos and reestablish visitation, the Koshkos remained largely incommunicado. The Hainings retained an attorney in an effort to facilitate some discussion, which was answered by the Koshkos' proposal to allow a single visit and the possibility of future visitation. The Hainings refused, declining to accept anything less than a commitment to regular visitation with the grandchildren.

On 19 April 2004 the Hainings filed in the Circuit Court for

Baltimore County a grandparent visitation petition pursuant to the Maryland Grandparental Visitation Statute (GVS). The trial court entered an order granting the Hainings' petition, finding that visitation was in the best interests of the grandchildren. In addition to establishing a rolling schedule of four-hour visits every 45 days and quarterly overnight visits, the trial court directed that the Koshkos and Hainings attend at least four joint, professional counseling sessions to discuss issues relating to the visitation. After an unsuccessful bid for a new trial, the Koshkos appealed the judgment of the Circuit Court.

The Court of Special Appeals affirmed the judgment, holding that the GVS was neither facially unconstitutional nor unconstitutional as applied to the Koshkos as claimed. *Koshko v. Haining*, 168 Md. App. 556, 897 A.2d 866 (2006). The intermediate appellate court rejected the argument that the GVS violated the Koshkos' fundamental right to parent, as articulated in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality), simply because it failed to contain an express rebuttable presumption that parental decisions are in the best interests of children. Under the principle of constitutional avoidance, the court interpreted the GVS to contain such a presumption. The Court of Special Appeals then disagreed with the Koshkos' position that there must be a threshold finding of either parental unfitness or exceptional circumstances as a predicate to the statutorily-imposed best interests of the child inquiry. Finally, the court affirmed the visitation award upon a finding that the grandparents had rebutted successfully the presumption in favor of the Koshkos' decision to terminate visitation. The Koshkos petitioned the Court of Appeals, which granted the petition and issued a writ of certiorari to consider the Koshkos' substantive due process challenge to the GVS.

Held: The GVS, codified at Maryland Code (1984, 2004 Repl. Vol.), Family Law Article § 9-102, permits a Maryland court to grant grandparents reasonable visitation with their grandchildren upon a finding that to do so was in the children's best interests. The express terms of the statute, however, do not prescribe that courts apply a presumption in favor of parental decisions relating to third party visitation with their children. The U.S. Supreme Court held in *Troxel* that substantive due process principles require that court determinations of third party visitation cases under the best interest of the child standard must be informed by a parental presumption. Maryland law also contained a long-settled presumption that parental decisions are in a child's best interests. Rather than invalidate the Maryland statute on its face, the Court of Appeals, under the principle of constitutional avoidance, interpreted the GVS to contain the

presumption, as had the Court of Special Appeals.

The Court, however, concluded, under strict scrutiny analysis, that the GVS was unconstitutionally applied to the Koshkos because the statute lacked sufficiently narrow tailoring to the State's interest in children's welfare vis-a-vis the children's beneficent exposure to grandparents. Strict scrutiny was triggered because the statute implicated the Koshkos' fundamental right to parent. Specifically, the GVS imposed a "direct and substantial" interference with the Koshkos' decision regarding visitation by interjecting the State and third parties, without a claim to a constitutional right to visitation, into the custodial parents' decision-making process. This process is generally left to the discretion of fit parents, who are presumed to act in the best interests of their children. The Court found this direct interference also to be substantial in nature. Although visitation matters may prove to be less weighty an intrusion upon the parental presumption than custody and adoption matters in the non-constitutional realm, for purposes of substantive due process analysis, third party visitation disputes impede just as substantially upon the fundamental right to parent as do custody and adoption disputes. In order to remedy this lack of narrow tailoring in the statute, the Court again employed the principle of constitutional avoidance and applied the GVS with a judicial gloss. This gloss requires a threshold finding of parental unfitness or exceptional circumstances demonstrating the detriment that has or will be imposed on the children absent visitation by their grandparents before the best interests analysis may be engaged. This parental unfitness/exceptional circumstances test was an extension of a third party custody case, *McDermott v. Dougherty*, 385 Md. 320, 869 A.2d 751 (2005). The Court reasoned that custody and visitation matters generally have been decided under the same standards and that the fundamental right to parent is equally at risk from undue state interference in the context of both custody and visitation determinations. Accordingly, the parental unfitness/exceptional circumstances safeguard imposed in third party custody determinations appropriately should be applied in third party visitation matters as well. The Court thus overruled its precedent in *Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121 (1993), and progeny, that held such threshold findings unnecessary in third party visitation cases. The Court remanded the case for application of the new threshold requirement.

Glen Koshko, et ux. v. John Haining, et ux., No. 35, September Term 2006, filed January 12, 2007. Opinion by Harrell, J.

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INSURANCE - INSURABLE INTEREST - CONTRACT OF SALE

Facts: In December, 1995, Robert Berrett relocated from California, where he had been living for some twenty years, to his home state of Maryland and began residing at 4305 Gallatin Street, his family's home. In February, 1999, after having made numerous improvements to the home, he learned that it was not insured, which precipitated his application for insurance with Standard Fire. Mr. Berrett timely paid all of the premiums on the policy and, when it expired in February, 2000, renewed it for another year.

In March, 2000, Mr. Berrett filed a verified petition, through counsel, in the Circuit Court for Prince George's County, to be appointed guardian over the person and property of his mother, Charlotte Berrett. He alleged that he was her primary care taker and that she was no longer able to handle her financial, business, legal, and personal matters. He also alleged that his mother "owns two parcels of real estate commonly known as 4305 Gallatin Street, Hyattsville, Maryland 20783 and 2303 Fordham Street, Hyattsville, Maryland 20783," and listed himself and his four siblings as interested parties to the proceedings. Mr. Berrett filed a verified amended petition in May, 2000, in which he again alleged that his mother owned 4305 Gallatin Street, and a verified emergency petition in June, iterating that she owned 4305 Gallatin Street. After a hearing on Mr. Berrett's petition, a judge of the Circuit Court for Prince George's County appointed Richard C. Daniels, an attorney, as the guardian of Charlotte Berrett's property, and Theresa Grant of the Prince George's Office of Aging, as guardian of her person. Shortly thereafter, Mr. Daniels petitioned the court for approval of a contract of sale for $89,000.00 for 4305 Gallatin Street, which was granted on November 9, 2000.

On November 25, 2000, fire destroyed the home before settlement and thereafter the purchaser exercised his right to rescind, pursuant to the contract's risk of loss clause, and the home was razed and the property subsequently sold to the same purchaser for a reduced price of $40,000.00.

In the interim, Mr. Berrett filed a claim for $388,000.00 with Standard Fire to recover for the loss of the home. Standard Fire denied the claim, alleging that the court-approved sale of 4305 Gallatin Street extinguished Mr. Berrett's interest in the property so that he did not possess an insurable interest at the time of the loss.

In his complaint against Standard Fire, Mr. Berrett alleged

that he had an insurable interest in 4305 Gallatin Street because his mother, in an unrecorded deed, had conveyed a remainder interest to him in the property, while retaining for herself a life estate, and also because Mr. Berrett had resided in and made extensive improvements to the home between 1995 and 2000. In response to Mr. Berrett's complaint, Standard Fire filed a motion for summary judgment, alleging that the judicial approval of the sale of 4305 Gallatin Street on November 9, sixteen days before the fire, had extinguished Berrett's insurable interest in the property. Standard Fire also argued that, because Mr. Berrett alleged in his verified petitions for his mother's guardianship that his mother was the owner of 4305 Gallatin Street, that he now was precluded under both the doctrines of collateral estoppel and estoppel by admission from asserting his claim in the property. After the hearing on Standard Fire's summary judgment motion, the trial court granted summary judgment to Standard Fire.

Mr. Berrett noted a timely appeal to the Court of Special Appeals, which reversed the trial court's entry for summary judgment, determining that Mr. Berrett did possess an insurable interest in the property at the time of the fire and that Mr. Berrett was neither collaterally nor judicially estopped from asserting his ownership interest therein.

Held: Affirmed. Mr. Berrett did possess an ownership interest, and therefore an insurable interest, in the property at the time of the fire because the sale was never completed. The Court concluded that Mr. Berrett was not collaterally estopped from asserting his ownership interest because the issue in the guardianship proceeding was not identical to the issue before the court in the insurance claim proceeding, nor was there a final judgment on the merits as to Mr. Berrett's ownership interest. Further, the Court also determined that the allegations made by Mr. Berrett in the guardianship proceedings were not inconsistent with his assertion that he possessed an economic interest in 4305 Gallatin Street in his law suit against Standard Fire, and therefore judicial estoppel was not applicable.

The Standard Fire Insurance, Co. v. Robert C. Berrett, No. 8, September Term, 2006. Opinion by Battaglia, J., filed November 13, 2006.

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INSURANCE - PERFECTING SERVICE OF ADMINISTRATIVE ORDERS - INSURANCE ADMINISTRATION ORDER WAS "SERVED" WHEN MAILED, NOT WHEN RECEIVED. THUS, THE 30 DAY PERIOD FOR APPEAL BEGAN TO RUN UPON THE DATE OF THE MAILING OF THE ORDER.

Facts: On April 28, 2002, a tornado touched down in La Plata, Maryland, destroying J.T.W.'s home and personal property. Following this incident, he filed several claims with his homeowner's insurance carrier and agent, respectively: Centre Insurance Company, Inc. and Z.C. Sterling Insurance Agency, Inc. (collectively "Centre"). Some benefits were paid out, but J.T.W. was not fully satisfied with the result. Consequently, J.T.W. filed administrative complaints with the Maryland Insurance Administration ("MIA") charging that Centre violated the Insurance Article by the manner in which it handled his claims.

Two complaints, in particular, were heard by the MIA, which failed to find any violations by Centre, in either instance. In each case, J.T.W. requested an administrative hearing. Hearings were held on July 28 and 29, 2004, and September 15, 2005, respectively, with both rulings in favor of Centre. The two cases came before the Court of Appeals as cases No. 52 and 56.

In case No. 52, the Administrative Law Judge (ALJ) mailed the resulting order to the parties on October 14, 2004. J.T.W. received the order on October 20, 2004, and on November 19, 2004, filed a petition for judicial review in the Circuit Court for Charles County, 36 days after the order was mailed and 29 days after he received the order. Centre filed a motion to dismiss J.T.W.'s petition, arguing that Maryland Code (1995, 2003 Repl. Vol.), § 2-215(d) of the Insurance Article requires that a petition for judicial review must be filed within 30 days after such a petitioner for judicial review is served with the order, and that § 2-204(c) of the Insurance Article defines service as the *mailing* of an order. J.T.W. argued that the operative date for service was his *receipt* of the order. The Circuit Court found in favor of Centre and, on April 20, 2005, dismissed J.T.W.'s appeal of the administrative order.

J.T.W. then timely appealed to the Court of Special Appeals. On April 28, 2006, that court reversed the Circuit Court's decision, finding that, under Maryland Rule 7-203(a)(3), the 30-day time limit began to run on the date of receipt. *J.T.W. v. Centre Ins. Co.*, 168 Md. App. 492, 897 A.2d 288 (2006). Centre timely filed a petition for certiorari, which the Court of Appeals granted on August 29, 2006. *Centre Ins. Co. v. J.T.W.*, 394 Md. 307, 905 A.2d 842 (2006).

In case No. 56, the ALJ mailed the resulting order to the parties on October 18, 2005. J.T.W. asserted that he received the order in the mail on October 21, 2005. On November 18, 2005, J.T.W. filed a petition for judicial review in the Circuit Court for Charles County, 31 days after the order was mailed and 28 days after he received the order. Centre filed motions to dismiss, which the Circuit Court granted on March 30, 2006. J.T.W. then timely appealed to the Court of Special Appeals. Prior to that hearing, Centre filed a petition for writ of certiorari, which the Court of Appeals granted on September 8, 2006. The Court of Appeals then consolidated cases No. 52 and 56.

Held: Reversed and Affirmed. The Court of Appeals held that the term "service," as utilized in Maryland Code (1995, 2003 Repl. Vol.), § 2-215 of the Insurance Article, is defined by § 2-204(c) of the Insurance Article. Section 2-204(c) states that service of an order or notice may be accomplished by *mailing*. Therefore, the Court of Appeals found that J.T.W. was not timely in his filing of his petitions for judicial review. Thus, the Court of Appeals reversed the decision of the Court of Special Appeals in case No. 52 and affirmed the Circuit Court's decision in case No. 56.

Centre Insurance Company, et al. v. J.T.W., No. 52 & No. 56 September Term, 2006, filed January 9, 2007. Opinion by Cathell, J.

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MUNICIPAL LAW - CONDEMNATION - OPEN MEETINGS ACT

Facts: In 1997, and on an annual basis thereafter, the Mayor and Board of Aldermen of the City of Frederick ("Aldermen") approved the allocation of funds in the City's five-year budget for the construction of a "fourth parking deck" within the City's limits. A Garage Site Evaluation Study in 1999 recommended 134 through 140 West Patrick Street, a property owned by J.P. Delphey Limited Partnership, as the site "having the least negative impact

on downtown Frederick while yielding the greatest benefit."

On August 9, 2000, the Mayor and Aldermen voted to move forward with the purchase of land adjacent to the courthouse and commissioned an appraisal of the property owned by Delphey. In October, 2000, the Mayor tried to purchase the property for $1,200,000.00, but Delphey rejected the offer, stating that it was "unacceptable," and counter-offered to sell the property for a minimum of $3,000,000.00.

In 2001, the Mayor and Aldermen created a Parking Task Force which produced a Downtown Parking Plan confirming the 1999 Garage Site Evaluation Study's selection of the Delphey property as the best site and recommending that the City acquire the necessary property to construct the new parking deck as soon as possible, and, if condemnation were necessary, to begin the process immediately. The Mayor and Aldermen adopted those recommendations during a meeting open to the public on September 6, 2001. At another public meeting in April, 2002, the Mayor and Aldermen approved the "Deck 4 Parking Agreement," a finance agreement between the City and Frederick County for the construction of the new parking garage which incorporated Delphey's property as the site selected for construction of the new deck. In September, 2002, after the Delphey property was reappraised for $1,675,000.00, the Mayor and Aldermen extended another offer to Delphey in that amount, plus $200,000.00 for relocation fees and $50,000.00 to sign the agreement. Maintaining that the property was worth over $3,000,000.00, Delphey responded to this second offer by letter, stating, "[considering how far apart we are at this time, we respectfully reject this offer."

On November 6, 2002, the Mayor and Aldermen closed the end of their regularly scheduled meeting to the public and voted unanimously to begin condemnation proceedings with regard to the Delphey property.

The Mayor and City of Frederick subsequently filed a complaint in the Circuit Court for Frederick County to initiate the condemnation process. Before trial, the judge heard oral argument on whether the City possessed the requisite authority to condemn the Delphey property. Delphey asserted that the condemnation proceeding had been brought improperly because no ordinance specific to the property had been enacted as required by Section § 2 (b)(24) of Article 23A, and that the City violated Section 8 of Article 23A by voting to condemn the Delphey property in a closed, executive session. The City responded that it acted pursuant to Section 173 of the City Charter, which granted the Mayor and Aldermen the authority to condemn properties, so that

no ordinance specific to the property was required. After a hearing, the judge ruled that the City was entitled to condemn the Delphey property. A six-person jury subsequently rendered an inquisition, setting Delphey's total damages to be $1,015,000.00, and the court issued an order that, upon payment of the damages, title in the property should vest in the City of Frederick.

Delphey noted a timely appeal to the Court of Special Appeals, which affirmed the trial court and held that neither Section 2 (b)(24) of Article 23A nor Section 173 of the Frederick City Charter require the enactment of ordinances specific to the property to be condemned. The Court of Special Appeals further concluded that the condemnation of the Delphey property constituted an executive, not a legislative, action and therefore, did not require the passage of an ordinance specific to the property.

Held: The Court of Appeals affirmed the Court of Special Appeals's judgment and held that the Aldermen's vote to condemn the Delphey property constituted a proper exercise of the authority vested in that legislative body by Section 2 (b)(24) of the Article 23A and Section 173 of the City of Frederick Charter, and that no ordinance, or legislative act, specific to the property was required. The Court further determined that the Aldermen did not violate Section 10-508 (a)(3) of the Open Meetings Act, which provides an exception to the general prohibitions of Section 8 of Article 23A, when they voted to condemn the Delphey property in a closed session, because Section 10-508 (a)(3) permits public bodies to discuss or act on the acquisition of real property for a public purpose in a closed session.

J.P. Delphey Limited Partnership v. Mayor and City of Frederick, No. 41, Sept. Term, 2006. Opinion by Battaglia, J., filed December 14, 2006.

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REAL PROPERTY - RIGHT OF FIRST REFUSAL - TRIGGERING OFFER - GOOD FAITH - MATCHING OFFER.

Facts: Petitioner, David A. Bramble, Inc. ("Bramble"), a Maryland corporation engaged in the business of mining gravel and sand, is the holder of a right of first refusal in a particular parcel of land located in Caroline County ("the Property"). The landowners, John O. Lane and Rose T. Lane ("Lanes"), received from Respondents, Merrill F. Thomas and Nancy R. Thomas ("Thomases"), an offer to purchase the Property. Added by hand-written addendum to the offer was a "no mining" clause which purported to forbid mining on the Property. When Bramble attempted to exercise its right of first refusal by making a matching offer, it omitted this prohibition on mining. After the landowners refused to convey to either the Thomases or Bramble, the Thomases filed suit in the Circuit Court for Caroline County seeking, *inter alia*, specific performance of their offer to purchase the Property. Both the Lanes and Bramble moved for summary judgment. The Circuit Court declared that although Bramble's preemptive right did not violate the rule against perpetuities, Bramble's purported exercise of the right of first refusal was ineffectual because the matching offer exercise of the first refusal was not made "on the terms of the intended sale," to wit, the omission from the matching offer of the "no mining" provision. The Court of Special Appeals, in an unreported opinion, affirmed the grant of summary judgment. The Court of Appeals issued a writ of certiorari on Bramble's motion.

Held: Reversed. A right of first refusal, or "preemptive right," is a type of option, *Ferrero Constr. Co. v. Dennis Rourke Corp.*, 311 Md. 560, 567, 536 A.2d 1137, 1140 (1988), and subject to many of the same rules as an option agreement. Restatement of Property § 413, cmt. b (1944). Maryland law recognizes generally that the exercise of an option must be in exact accord with its terms. *Foard v. Snider*, 205 Md. 435, 446, 109 A.2d 101, 105-06 (1954). Maryland law is ambiguous, however, as to whether the exercise of a right of first refusal must match exactly the terms of a triggering offer, or whether it must match only those terms material to the offer. Other jurisdictions are likewise split on the issue.

We need not decide the issue here, however, because there was a genuine dispute of material fact sufficient to defeat summary judgment, i.e., whether the "no mining" provision was added in bad faith in order to frustrate Petitioner's preemptive right in the Property. A property owner, for the purpose of discouraging the holder of a preemptive right in the property from exercising its right of first refusal, may not insert into the triggering offer

terms which it knows will be repugnant to the holder. *Miller v. LeSea Broad. Corp.*, 87 F.3d 224, 227-28 (7th Cir. 1996). This approach protects the equitable property interest a holder of a preemptive right has in the property, allows a property owner to dispose otherwise of the property as he, she, or it deems appropriate, and comports with general notions of good faith and fair dealing followed generally in Maryland contract law. *Straley v. Osborne*, 262 Md. 524, 517-18, 278 A.2d 64, 66-67 (1971).

In the present case, summary judgment was an improper means of determining the rights of the parties. While the "no mining" clause could have been inserted into the triggering offer for some legitimate reason, there is evidence on the record, if believed, that the Lanes and/or Thomases inserted the provision as a "poison pill" in order to frustrate Bramble's exercise of its right. Bramble had been mining, for sand and gravel, land adjacent to the property for years. Ms. Thomas was a registered real estate agent, and likely knew the activities of the property owners in the vicinity of the property. Lastly, the hand-written addendum by which the clause was added could support a conclusion that the "no mining" provision was an after-the-fact method of dissuading exercise of Bramble's preemptive right. Summary judgment in favor of Respondents, therefore, was improper.

David A. Bramble, Inc. v. Merrill F. Thomas, et ux., No. 32, September Term, 2006, filed January 8, 2007. Opinion by Harrell, J.

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TORTS - MEDICAL MALPRACTICE - MISTRIAL - INFORMED CONSENT

Facts: In November of 1999, Mr. Boone was referred by his primary care physician to Petitioner, Seth M. Goldberg, M.D., an ear, nose and throat doctor, and the sole owner and shareholder of Aesthetic Facial Surgery Center of Rockville, Ltd., due to an ear infection and white, pus-like drainage that Mr. Boone was experiencing in his left ear. Dr. Goldberg determined that Mr.

Boone had another cholesteatomoa and that the condition had the potential of being life-threatening. On January 6, 2000, Dr. Goldberg performed an out-patient revisionary mastoidectomy on Mr. Boone to remove the cholesteatomoa. The day after the procedure, Mr. Boone began experiencing difficulty reading, remembering names, and recalling words. A subsequent MRI scan and a CT scan of Mr. Boone's brain revealed hemorrhaging and an apparent opening in his skull at the cite of the hemorrhaging.

Mr. Boone filed a complaint in the Circuit Court for Montgomery County in December of 2002 against Dr. Goldberg, in which he alleged that Dr. Goldberg had negligently punctured his brain with a surgical instrument during the revisionary mastoidectomy, causing serious and permanent brain damage. Mr. Boone also alleged that Dr. Goldberg failed to inform Mr. Boone that the revisionary procedure would be more complex than a standard revisionary mastoidectomy, that there was a risk of sustaining brain damage from the procedure, and that there were more experienced surgeons to perform the procedure in the region than Dr. Goldberg, who only had performed one revisionary mastoidectomy in the past three years and requested in his pretrial pleadings that the Maryland Civil Pattern Jury Instruction on informed consent be given.

During the trial, Dr. Goldberg put on several medical experts, one of whom was Dr. David Schretlen, a neuropsychologist who had performed extensive neuropsychological examinations of Mr. Boone and whose testimony went to the issue of damages. On cross-examination of Dr. Schretlen, counsel for Mr. Boone asked whether Dr. Shcretlen was a paid minimizer, to which counsel for Dr. Goldberg objected; the objection was overruled. Counsel for Mr. Boone also asked Dr. Schretlen whether he had testified on behalf of one of the DC snipers, to which counsel for Dr. Goldberg again objected; the objection was sustained.

At the close of evidence, Dr. Goldberg asked that the judge refrain from giving the informed consent instruction because Mr. Boone had failed to put on any evidence establishing proximate cause; his request was denied. The jury subsequently found that Dr. Goldberg had breached the standard of care in his performance of the revisionary mastoidectomy on Mr. Boone causing Mr. Boone's injuries, and that Dr. Goldberg had failed to adequately advise Mr. Boone of the risks of the procedure, and that failure was a proximate cause of Mr. Boone's injuries, and awarded Mr. Boone $113,000 for loss of past and future earning capacity, $355,000 for past and future medical expenses and $475,000 for non-economic damages, for a total award of $943,000.

Dr. Goldberg noted a timely appeal to the Court of Special Appeals, which held that the Circuit Court for Montgomery County erred in submitting an informed consent instruction to the jury because physicians in Maryland do not have a duty to inform their patients that there are other, more experienced surgeons in the region, but that the error did not warrant a new trial on the issue of negligence. The intermediate appellate court also concluded that the cross-examination questions regarding one of the D.C. snipers asked of one of Dr. Goldberg's expert witnesses was so prejudicial as to warrant a new trial on the sole issue of damages.

On writ of certiorari to the Court of Appeals, Dr. Goldberg sought review of the Court of Special Appeals' judgment determining that the erroneous submission of the informed consent instruction to the jury did not warrant a new trial on the issue of negligence. Dr. Goldberg also sought review of the intermediate appellate court's conclusion that the cross-examination questions regarding one of the D.C. snipers asked of one of Dr. Goldberg's expert witnesses was so prejudicial as to warrant a new trial on the sole issue of damages.

Held: The Court of Appeals reversed the Court of Special Appeals's judgment, concluding that, although the line of questioning about the sniper case was improper, its prejudicial effects did not transcend the trial judge's curative measures so as to warrant a new trial. The Court also determined that the trial judge had properly instructed the jury on the issue of informed consent because whether a reasonable person, in Mr. Boone's position, would have deemed the fact that there were other, more experienced surgeons in the region as material to the decision whether to risk having the revisionary mastoidectomy undertaken by Dr. Goldberg was a factual issue for the jury to determine.

Seth M. Goldberg, et al v. Billy Karl Boone, No. 21, Sept. Term 2006. Opinion by Battaglia, J., filed December 12, 2006.

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TORTS – MEDICAL MALPRACTICE ACTIONS – EXPERT REPORTS – DISMISSAL – UNDER THE HEALTH CARE MALPRACTICE CLAIMS STATUTE, A COURT MUST DISMISS A CLAIM, WITHOUT PREJUDICE, WHEN A MEDICAL MALPRACTICE CLAIMANT FAILS TO ATTACH THE REQUIRED ATTESTING EXPERT REPORT TO THE CERTIFICATE OF QUALIFIED EXPERT

Facts: Respondent Keith J. Osborne sought treatment from Clifford S. Walzer, D.M.D., of Walzer & Sullivan, D.D.S., P.C. ("Petitioners"), for a broken jaw and related injuries in August and September of 2000. On August 27, 2003, Respondent initiated proceedings against Petitioners by filing a Statement of Claim with the Health Care Alternative Dispute Resolution Office of Maryland, alleging that Dr. Walzer was negligent in his treatment of Respondent. In November, Respondent filed a certificate of qualified expert, but failed to attach an attesting expert report. Petitioners waived arbitration. Respondent filed a complaint in the Circuit Court for Anne Arundel County and Petitioners filed an answer. Petitioners then filed a "Motion to Strike Respondent's Certificate and to Dismiss, or, in the alternative, for Summary Judgment." Respondent filed a response to the motion in October, to which he then attached an attesting expert report. The Circuit Court heard the case in December, and dismissed the case without prejudice on the grounds that the attesting expert report was not attached to the certificate of qualified expert as required by Maryland law.

Respondent appealed to the Court of Special Appeals. On March 1, 2006, the Court of Special Appeals filed its reported opinion, *Osborne v. Walzer*, 167 Md. App. 460, 893 A.2d 654 (2006), holding that the language of Md. Code (1974, 2002 Repl. Vol., 2006 Cum. Supp.), § 3-2A-04(b)(3) of the Courts & Judicial Proceedings Article, does not require a court to dismiss a case when a claimant fails to attach an attesting expert report to the certificate of qualified expert. That court held that dismissal is appropriate only upon a showing that Petitioners suffered some prejudice, because, without a showing of prejudice, dismissal was too harsh a penalty. The Court of Special Appeals decided that there was no showing of prejudice here. Petitioners filed a petition for writ of certiorari in the Court of Appeals, which the Court granted. *Walzer v. Osborne*, 393 Md. 242, 900 A.2d 749 (2006).

Held: Judgment of the Court of Special Appeals reversed. The Court of Appeals examined the language of § 3-2A-04(b), known commonly as the Health Care Malpractice Claims Statute, to discern the Legislative intent at the time of its enactment. The Court determined that the clear language of § 3-2A-04(b) mandates that the certificate of qualified expert be complete, with an attesting

expert report attached. The Court also concluded that, according to the plain language of § 3-2A-04(b), dismissal of the claim without prejudice is the appropriate remedy when the claimant fails to attach the report in a timely manner. The Court explained that it is not the task of the judiciary to re-write a statute and that even if the legislatively-imposed sanction was harsh, as the Court of Special Appeals concluded, it is not for that court to read into the statute the element of prejudice. The Court of Appeals held that because Respondent failed to attach an attesting expert report to the certificate of qualified expert, the certificate was incomplete. Therefore, dismissal without prejudice was the appropriate remedy.

Walzer v. Osborne, No. 20, September Term 2006, filed November 17, 2006. Opinion by Greene, J.

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WORKERS' COMPENSATION - FEDERAL SUPREMACY; PREEMPTION

Facts: Appellant Christopher Hill was injured while working on a pier in Baltimore when a forklift dropped a load of plywood on him. The forklift was operated by Hill's co-employee, appellee Daniel Knapp.

Hill filed a claim for compensation and medical expenses under the Maryland Workers' Compensation Act, Md. Code (1999, 2006 Cum. Supp.), § 9-101 *et seq.* of the Labor & Employment Article, for accidental injury suffered in the course of employment. The Workers' Compensation Commission granted an award to Hill. Hill was also eligible for compensation under the federal Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, because he was injured in the "twilight zone," an area of

concurrent jurisdiction where state and federal workers' compensation coverage overlapped. Hill did not file a claim under the LHWCA.

Hill filed a state common law negligence action against Knapp in the Circuit Court for Baltimore City on June 2, 2005. After a hearing, the Circuit Court entered summary judgment in favor of Knapp, finding that the federal LHWCA preempted the state co-employee negligence claim.

Appellant noted a timely appeal to the Court of Special Appeals. The Court of Appeals granted certiorari on its own initiative prior to a decision by the Court of Special Appeals. *Hill v. Knapp*, 393 Md. 477, 903 A.2d 416 (2006).

Held: Affirmed. The Maryland Workers' Compensation Act does not exclude tort actions between co-employees. This stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal Longshore and Harbor Workers' Compensation Act, which immunizes workers from suits by fellow employees in 33 U.S.C. § 933. Congress intended the LHWCA to immunize harbor workers from co-employee negligence suits and to permit a uniform compensation system for injured maritime workers, regardless of whether their injury occurred in the "twilight zone" or over water. In accordance with the Supremacy Clause of the United States Constitution, state law must yield when it conflicts with federal law.

Christopher Hill v. Daniel Knapp, No. 45, September Term, 2006, filed January 16, 2006. Opinion by Raker, J.

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COURT OF SPECIAL APPEALS

ESTATES AND TRUSTS – WILLS – TESTAMENTARY CAPACITY – INSANE DELUSION RULE.

Facts: A son brought an action for judicial probate, seeking to be named the personal representative of the estate of his father and to set aside the will, which disinherited him. The son contended that the will should be set aside because it was the product of the father's insane delusion that the son had stolen his money.

The Circuit Court for Harford County, sitting as the Orphans' Court, admitted the will to probate over the son's objections.

Held: Affirmed. The Orphans' Court properly found on the evidence presented that the testator's belief that his son had stolen his money, while false, was not an insane delusion. The insane delusion rule provides that, when a testator's will is the offspring of an insane delusion, it will be set aside for lack of testamentary capacity.

Dougherty v. Rubenstein, No. 2570, Sept. Term, 2005, filed January 4, 2007. Opinion by Eyler, Deborah S., J.

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FAMILY LAW – ALIMONY – EXERCISE OF DISCRETION – "MARRIAGE TYPE RELATIONSHIPS.".

Facts: After 23 years of marriage, appellee wife filed for

divorce. At the time of trial, appellant husband earned approximately $150,000 annually in the information systems field. Appellee wife earned approximately $28,800 annually as a freelance graphic designer. No children were born of the marriage. Both parties were involved in extramarital affairs prior to separation and cohabitated with their respective paramours post-separation.

Following a trial, the Circuit Court for Anne Arundel County granted wife's complaint for divorce and awarded wife a monetary award, indefinite alimony, and counsel fees. In a subsequent amended judgment, the circuit court awarded wife an interest in the marital portion of the survivor benefit of husband's pension.

Held: Affirmed in part and reversed in part. The circuit court properly granted wife a divorce. The indefinite alimony award must be vacated, however, because the circuit court failed to exercise any discretion in deciding whether to award indefinite alimony. It is legal error for a court to fail to exercise discretion in making a discretionary decision. On remand, the court should also consider wife's involvement in a "marriage type relationship" to the extent that it has an impact on her financial status and give it whatever weight it deems appropriate in determining the alimony award.

Monetary award and award of counsel fees must also be vacated when alimony award is vacated because all are interrelated.

Whittington v. Whittington, No. 32, Sept. Term, 2006, filed January 4, 2007. Opinion by Eyler, Deborah S., J.

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REAL PROPERTY - UNJUST ENRICHMENT - RESTITUTION - OVERPAYMENT TO A SELLER OF REAL ESTATE DUE TO A MORTGAGOR'S NEGLIGENT FAILURE TO REPORT AN OUTSTANDING LIEN CREATED AN UNJUST ENRICHMENT REQUIRING RESTITUTION

Facts: Appellant's mother conveyed real property to appellant, subject to a life estate. Subsequently, appellant's mother acquired a mortgage lien on the property. Upon the death of appellant's mother in May 2003, fee simple ownership of the property vested in appellant. Appellant thereafter sold the property. Appellee provided settlement services in connection with the sale and requested appellant to provide information on all outstanding liens on the property. Discovering the outstanding mortgage, appellee requested payoff information from the lender, who incorrectly reported the loan as paid. The error resulted in appellant's receipt of the full purchase price without payment to lender, which was still owed $70,251.26 on the mortgage. Appellee reimbursed the lender for the outstanding balance and sought restitution from appellant. The Circuit Court for Baltimore County declared the $70,251.26 a windfall to appellant and ordered restitution to appellee.

Held: Affirmed. Appellant was not entitled to the unanticipated benefit at settlement. Appellee was neither a gratuitous nor officious payor. Equity required appellant repay the amount she was unjustly enriched. Appellee had standing to bring an equitable action against appellant based on its underwriting agreement with the title insurer. Appellee's complaint, sounding in unjust enrichment and money had and received, fairly set out the nature of the claim and the remedy sought.

Hill v. Cross Country Settlement, LLC, No. 2283, September Term 2205, filed January 5, 2007. Opinion by Sharer, J.

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